



November 3, 2017

Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Jason Botel
Acting Assistant Secretary, OESE
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

RE: New York State Education Department Request for a Waiver of Statutory Requirements of the Elementary and Secondary Education Act (ESEA)

Dear Secretary DeVos and Acting Assistant Secretary Botel:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) Education Task Force write regarding the New York State Department of Education (NYSED) request submitted to the U.S. Department of Education (USED) on September 18, 2017 formally requesting a waiver of two statutory requirements of Title I, Part A of ESEA/ESSA. This request asks the USED to grant NYSED a waiver to:

- 1) allow school districts to administer grades 3-8 assessments in English Language Arts and mathematics at not more than two grade-levels below chronological grade-level for students with disabilities whose “lack of chronological grade-level proficiency can be determined by local Committees on Special Education” and,
- 2) use these student’s results on these examinations when making participation and accountability determinations at the elementary and middle school levels.

The CCD Education Task Force advocates for Federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of living. The CCD Task Force sees these principles as critical elements in a society that recognizes and respects the dignity and worth of all its members.

With this mission in mind as well as the advocacy we conduct on behalf of children with disabilities, **we ask that USED deny the NYSED request and advise NYSED to adhere to the statutory and regulatory provisions of ESSA regarding the assessment of students with disabilities.**

This request is without merit for several reasons. Among these are:

➤ **REQUEST WAS PREVIOUSLY DENIED BY USED.**

A similar request was made under NYSED's ESEA Flexibility waiver and rejected by USED in 2015. (see June 2015 - New York Waiver Request Response at <http://www.p12.nysed.gov/accountability/documents/NYWaiverrequestresponse6.5.2015.pdf>) The reasons for that rejection remain unchanged. In fact, ESSA's federal assessment regulations provide an even stronger basis for rejection, as noted below.

➤ **VIOLATION OF ESEA ASSESSMENT REGULATIONS.**

ESSA and its [federal assessment regulations](#) (effective January 9, 2017) have not altered the requirement under the No Child Left Behind Act (NCLB) that all students are to be instructed and assessed on the grade level academic standards. Under ESSA, there are only two possible state assessments for students with disabilities—the general assessment and the alternate assessment aligned with the challenging State academic standards. Although the alternate assessment is based on alternate academic achievement standards, these achievement standards must be based on the grade level academic content standards. In other words, although the expectations for achievement are different, the content is still from the grade in which the student is enrolled. Since below grade level assessments are not permitted for students who take an alternate assessment, there is no valid rationale for offering below grade level assessments to students with disabilities who take the general assessment. The federal assessment regulations clearly express the importance of aligning assessment and instruction to the grade in which the student is enrolled:

§ 200.6 Inclusion of all students.

(a) Students with disabilities in general.

(1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

- (i) All children with disabilities as defined under section 602(3) of the IDEA;
- (ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and
- (iii) Students with disabilities covered under other acts, including—
 - (A) Section 504 of the Rehabilitation Act of 1973, as amended; and
 - (B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

- (ii) A student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—
 - (A) The general assessment under paragraph (a)(2)(i) of this section; or

(B) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, an alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State’s alternate academic achievement standards.

This federal regulation was the product of a negotiated rule-making process. There was consensus among the stakeholders that this language, which is consistent with the statutory language enacted by Congress, further clarifies that no assessment may be based on below grade level content and was important enough to be included.

➤ **DISCRIMINATION.**

New York has high percentages of students from other subgroups [as required to be reported and included by ESSA] who are performing poorly on state assessments (Level I); however, NYSED is not requesting a waiver to assess these students with “instructional” level assessments. For example, while 61% of students with disabilities scored at Level 1 in ELA in 2016-2017, 68% of English Learners, 35% of Black students and 34% of Hispanic students scored at that level. In Math, while 65% of students with disabilities scored at Level 1, 62% of English Learners, 46% of Black students, 41% of Hispanic students, and 40% of Economically Disadvantaged Students scored at Level 1 (Source: [https://data.nysed.gov/.](https://data.nysed.gov/))

Focusing only on a subset of students with disabilities unjustly discriminates against this group. It also violates these students’ rights under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) since it deprives these students with disabilities equal educational opportunities and benefits as those available to non-disabled students.

➤ **SEGREGATION & DISPROPORTIONALITY.**

NYSED data (see table below) regarding the educational environments of students with disabilities in the state indicate a high degree of segregation compared to the nation. This high level of segregation is particularly prominent among students whose disability category would make them most likely to be affected by the proposed waiver, particularly students with an Intellectual disability and Multiple disabilities. This segregation is likely leading to a lack of access to the general education curriculum and a lack of appropriate instruction which would disqualify a student from meeting the proposed criteria and guidelines for the “instructional level” assessments that NYSED is requesting a waiver to use (e.g., there must be an assurance that “the students are provided instruction with their chronological grade-level peers by appropriately certified teachers”.) Data also indicate disproportionality in the percentage of Black students identified for IDEA services in the Intellectual disability category (29.3% of ID students are Black vs. 18.2% of all students in NY). Therefore, these students are likely overrepresented in segregated classrooms and will also likely be overrepresented in the “instructional level” assessments proposed by NYSED.

EDUCATIONAL ENVIRONMENTS, AGES 6 THROUGH 21

Percent of Time Spent Inside the Regular Classroom

Disability Category	≥ 80% of Day State (%)	≥ 80% of Day Nation (%)	40 to 79% of Day State (%)	40 to 79% of Day Nation (%)	< 40% of Day State (%)	< 40% of Day Nation (%)	Separate School or Residential Facility State (%)	Separate School or Residential Facility Nation (%)
All disabilities	57.8	62.6	11.7	18.6	19.8	13.4	5.8	3.2
Autism	25.4	39.9	9.2	18.0	44.0	32.8	19.9	7.8
Deaf-blindness	16.7	23.2	5.6	13.4	27.8	34.4	38.9	25.3
Emotional disturbance	31.1	46.2	11.1	17.6	30.3	18.8	23.4	14.6
Hearing impairment	56.7	60.2	7.7	15.5	11.2	11.6	17.2	10.9
Intellectual disability	6.0	16.9	15.7	26.3	56.1	49.2	21.4	6.6
Multiple disabilities	8.2	13.4	14.0	16.4	45.4	46.0	28.7	20.2
Orthopedic impairment	64.2	54.5	7.0	15.9	11.2	21.8	8.7	4.4
Other health impairment	64.0	65.4	13.1	21.0	14.9	9.3	2.7	1.9
Specific learning disabilities	69.2	69.2	13.7	23.0	11.9	5.8	0.8	0.5
Speech or language impairment	65.7	86.8	7.5	5.1	18.4	4.3	1.2	0.3
Traumatic brain injury	39.5	49.9	21.0	22.2	24.0	19.6	9.6	5.6
Visual impairment	57.1	66.3	9.0	12.3	9.4	10.3	19.6	8.9

Source: New York Part B 2017 Data Display retrieved from osep.grads360.org

➤ **LACK OF TRANSPARENCY.**

The NYSED testing proposal will result in masking the students who would be assessed in this below-grade manner. Both ESSA and the Individuals with Disabilities Education Act (IDEA) require states to report on the number and percentage of students with disabilities who are assessed on the general state assessment (with or without accommodations) and the alternate assessment on alternate achievement standards. There is no reporting requirement for students with disabilities tested on an assessment for a lower grade. Thus, NYSED will not “maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the subgroups of students identified in section 1111(b)(2)(B)(xi)” as required by ESSA section 8401 (b)(1)(F).

➤ **LACK OF SUPPORT BY NEW YORK’S LARGEST LEA AND ADVOCACY ORGANIZATIONS.**

It is important to note that the New York City Department of Education opposes this waiver request, as acknowledged in the summary of comments at page 5. This lack of support from the

New York City school district that educates more than half (52%) of the state's students should be a critical consideration by USED.

Additionally, we urge USED to carefully review and consider the thoughtful letters of opposition submitted to NYSED by leading advocacy organizations. NYSED failed to submit these comments with its waiver request as required by ESSA Sec. 8401 (3)(A)(ii). USED should direct NYSED to submit all comments in their entirety.

We appreciate your attention to this issue. Please contact us with any questions.

Sincerely,

American Foundation for the Blind
Association of Assistive Technology Act Programs
Association of University Centers on Disabilities
Autistic Self Advocacy Network
Council for Learning Disabilities
Council of Parent Attorneys and Advocates
Disability Rights Education & Defense Fund
Institute for Educational Leadership
National Center for Learning Disabilities
National Center for Special Education in Charter Schools
National Disability Rights Network
National Down Syndrome Congress
TASH
The Advocacy Institute
The Arc of the United States

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